STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2004
v	No. 245844 Kent Circuit Court
JEFFREY LADON HOLLOWAY, Defendant-Appellant.	LC No. 02-004895-FC

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, following a seven-day jury trial. The trial court sentenced defendant as an habitual offender, third, to twenty-five to fifty years' imprisonment for the assault with intent to murder conviction, five to ten years' imprisonment for the felon in possession conviction, to be served concurrent to the assault sentence, and two years' imprisonment for the felony-firearm conviction.[1] Defendant appeals as of right, asserting he is entitled to a remand to bring a motion for new trial based on newly discovered evidence, prosecutorial misconduct, and that he was denied due process and the equal protection of the law where he received no credit against his new minimum sentences for the eight months he served in jail before his sentences for the instant crimes, which he committed while on parole. We affirm.

I

In the early morning of April 3, 2002, at about 2:15 a.m., fifteen year old Earl Barbee was shot six times while walking on the 1000 block of Sherman Street in Grand Rapids. Barbee testified at trial that on the morning in question he was walking alone in the area of Sherman and Neland Streets when he was approached by Chris Johnson, an acquaintance from the neighborhood. Barbee testified that, after he talked to Chris, defendant pulled up in a silver car, got out from the passenger side, walked toward Barbee, and called Barbee by name. The two

[1] At sentencing, the trial court stated that defendant's two-year felony-firearm sentence "will run consecutively with the 1½ to 20 year possession with intent to deliver cocaine sentence for which you were on parole status at the time of your arrest."

started talking. Defendant asked whether Barbee had some dope, and Barbee told him no. Barbee testified that he used to go with defendant's sister in elementary school, and that is how he knew defendant. Barbee testified that after he turned and walked away from defendant, the shooting started. Barbee testified that he ran when he heard shots, and after several were fired he turned back and saw defendant standing there with a handgun in his hand. After being shot, Barbee ran and eventually knocked on the door of a woman who called 911. The police found Barbee lying on the woman's front porch, bleeding from the mouth and chest, and missing teeth. Officer Gard testified that Barbee was not able at the time to speak clearly, that he repeatedly asked Barbee for a description of the suspect, and that Barbee did not name the shooter. The police found ten .380 shell casings, seven stamped "RP" and three stamped "Win," but were unable to determine whether all were shot from the same weapon. Barbee was hospitalized for three weeks and underwent multiple surgeries. On April 4, 2002, while in the hospital, Barbee identified defendant in a photographic show up and, although tubes in his mouth prevented him from talking, Barbee wrote or nodded his head, giving the shooter's name as Jeff, Jeff's physical description, and also relaying that two people were involved.

Defendant's theory of the case was that he was at home at the time of the shooting, with his mother, and a friend, Dirlean Jones. Dirlean Jones testified that she spent the night at defendant's house, where he lived with his mother, at 333 Highland Street. Jones testified that defendant and defendant's mother, Theresa, were at home all evening, and that the three played cards from 10 p.m. until defendant's mother went to bed around 1:30 or 2:00 a.m. Jones testified that she spent the entire night on the couch in the living room, and that at around 3:00 a.m. Brian Bobo came over to talk to defendant. Jones testified that defendant could not have left the house without her seeing it and that the alarm would have beeped if the door was opened.

Brian Bobo and Chris Johnson were subponead to testify at trial but did not appear.

Defendant testified that Earl Barbee used to be a friend of his sister's and that he last saw Barbee four or five years before the incident in question, when Barbee was around ten years old. Defendant testified that he knew Chris Johnson from school. He testified he had no reason to harm either Barbee or Johnson. Defendant testified that he was at home at the time of the shooting, that Dirlean Jones was at his house, and that when Brian Bobo came over the two went to defendant's bedroom and played dice. Defendant testified that he was not in the area of Sherman and Neland, was not in a silver car, and did not shoot Earl Barbee.

On cross-examination, defendant testified that when he was arrested, he did not tell the police about Dirlean Jones or Brian Bobo, and said only that his mother could confirm he was at home on the evening in question.

Detective Smith testified as a rebuttal witness that when he interviewed Dirlean Jones, she did not give him specific times during the evening in question, she told him she last saw defendant when he went to his room around 1:00 a.m., and that she did not remember when Bobo left the house. Smith testified that Dirlean told him she did not know if defendant left the house that night.

The jury convicted defendant as charged. This appeal ensued.[2]

II

Defendant contends that he is entitled to a remand for the trial court to permit him to move for a new trial based on newly discovered evidence. We disagree.

Where, as here, the trial court has not had opportunity to decide the issue initially or to determine whether an evidentiary hearing is necessary under MCR 7.211(C)(1), this Court examines the proffered affidavits under the standard for granting a new trial and determines whether a remand is necessary. In order for a new trial on the basis of newly discovered evidence to be granted, a defendant must show that 1) the evidence itself, not merely its materiality, was newly discovered, 2) the newly discovered evidence is not cumulative, 3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, and 4) the newly discovered evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); see also MCR 2.116(A)(1)(f).

Defendant's motion to remand attached affidavits from Michael Bowlson and Brian Bobo, and a signed statement from the store manager of Colortyme. Bowlson's affidavit[3] stated that around the beginning of April 2002, he ran into a man named J.B. on Franklin Street, and that J.B. told him "I think I just killed this dude on Sherman and Neland." Bowlson's affidavit states that he, Bowlson, cannot sit back and let an innocent person do time for something he did not do.[4]

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[2] Defendant filed a motion to remand for a new trial based on newly discovered evidence during the pendency of this appeal. This Court denied the motion by order dated September 22, 2003.

[3] Bowlson's statement, notarized on March 4, 2003, states:

> Im writing this in regard of an inocent [sic] man. Back around the beginning of April 2002 I was walkin down franklin when this guy I know by the name of J.B. pulled up beside me in a grayish silver Grand Am with his cousin from [illegible] J.B. got out of the driver side he had a strange look on his face. I thought he was about to try and [illegible] cause he always carried a gun on him and was known for robing [sic] people [.] he then said to I think I just killed this dude on Sherman and asked do you know who got some weed for sale? I said no and walked off
>
> I wrote this statement because I cant sit back and let a inocent [sic] person do time for something that he didn't do if I can help it.

[4] Bowlson's offender profile was also attached to defendant's motion, and states that he pleaded guilty of domestic violence, third offense, and was sentenced to one to two years in prison on October 9, 2002, and that he pleaded guilty of delivery of a controlled substance less than fifty grams, and was sentenced to 1 year and 9 months to twenty years on September 19, 2002.

We agree with the prosecution that Bowlson's affidavit gives no indication of any detail regarding the identity of "J.B.", or specific dates, times or other details that would lend an indicia of trustworthiness so that it would be likely to make a different result at trial probable. Bowlson's stated desire to prevent an injustice against defendant is insufficient to give his affidavit the necessary materiality, weight or trustworthiness from which it could be determined that the trial's outcome would probably be altered if a new trial were granted at which Bowlson were to testify.

Bobo's affidavit[5] was cumulative to Dirlean Jones' trial testimony that Bobo was at defendant's house on the evening in question and shot dice with defendant there. Further, it cannot be said that the contents of Bobo's affidavit was "newly discovered" under the circumstance that Bobo did not honor his trial subpoena and did not appear at trial. Additionally, the affidavit describes only intermittent comings and goings from defendant's house on April 2, 2002 without any reference to when or how long Bobo was with defendant after 1:00 a.m. on April 3, 2002; thus it did not resolve ambiguities left open by Dirlean Jones' testimony, and thus it would not make a different result probable on retrial.

Dirlean Jones testified at trial that she was at defendant's home on the evening in question, and that she remembered that it was the night of April 2, 2002 because her furniture had been delivered earlier that day. The Colortyme store manager's statement[6] coincides with

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[5] Bobo's affidavit, notarized on July 10, 2003, states:

> Hi my name is Brian Bobo. On this day Jeff and I were at his mother's house and my grandmothers house back and fourth [sic].
>
> We would sit at his house and watch videos and a few movies then when we got ready to smoke a cigarrette [sic] or get some air we would go to my grandmothers up the street
>
> We came back to Jeff house [sic] and watch the rest Friday After finishing the movie Jeff went to sleep I left to do the same because we were planning on hanging out.
>
> I returned later ready to go to (two Dollar Tuesday) Jeff wasn't feeling like it, so I went alone. Shortly after I left the bar I went back to Jeff [sic] house to pick him up because two young ladies were going to meet us at chicken coop but he wasn't up to it so we sat there talking for a little while and he was playing with some dice
>
> So we started shooting dollars.
>
> We shot dice for about an hour an [sic] a half then I started losing so I quit and I was feeling a little tired so I went up my grandmothers and feel [sic] asleep.

[6] The statement of the store manager at Colortyme is dated March 11, 2003:

(continued…)

Jones' testimony that her furniture was delivered on April 2, 2002, and would thus be cumulative. We agree with the prosecution that the manager's statement simply verifies that a bed was delivered to Jones' house on April 2, 2002, after a failed attempt to deliver it on an earlier date, and does not address the crucial conflicting testimony issues of what Jones knew of defendant's whereabouts on the evening in question, or when she was awake at defendant's house. We conclude that the statement was cumulative, and that defendant has not shown that a different result would probably obtain on retrial.

We conclude that defendant did not make the requisite showing under *Cress, supra,* so as to warrant a remand. Barbee, the victim, who was familiar with defendant, identified defendant as the shooter. Defendant's alibi defense was weakly supported; Dirlean Jones' trial testimony was impeached with her prior statement to police, and the contents of the affidavits and statement would not have made probable a different result on retrial. *Cress, supra.*

III

Defendant asserts that the prosecutor violated his due process rights by intentionally eliciting testimony that threats and an offer of money were made to two key prosecution witnesses, Barbee (the victim), and Chris Johnson. Defendant maintains that, although there was absolutely no allegation of a connection to defendant, the testimony implied that defendant had threatened or caused threats against these two witnesses and was thus clearly inflammatory and unfairly prejudicial and denied him a fair trial and a verdict based on admissible evidence.

Defendant concedes that this Court's review is for plain error that affected the outcome of the proceedings. *People v Carines,* 460 Mich 750, 761-764; 597 NW2d 130 (1999). Evidence of a *defendant's* threats against a witness is generally admissible to show a consciousness of guilt. *People v Sholl,* 453 Mich 730, 740; 556 NW2d 851 (1996) (emphasis added). For evidence of threats to be admissible, however, a connection to the defendant must be shown. *People v Lytal,* 119 Mich App 562, 576; 326 NW2d 559 (1982). Testimony by a victim that she was offered a reward for abandoning the case was held inadmissible because the prosecution presented no evidence indicating the offer was connected to the defendant in *People v Long,* 144 Mich 585, 585-586; 108 NW 91 (1906).

(…continued)

> Dirlean Jones has requested of me to wright [sic] down a schedule of events for her. It was on 3-28-02 that she came to the store and picked out which was typed up at a later time that day also a del was scheduled for Sat. the 30. She was to be home to sign the paperwork upon del the delivery guys drove around looking for the address with out finding it they went on to the next del. Later that day Dirlean called the store upset that she had been home all day waiting for the delivery and no one stopped by or called We reschuled [sic] fr Tues. April 2nd My self and another employee showed up to deliver Dirlean was not there upon arrival But her daughter told us she was on her way. So we started bringing in the Bed set & mattress. Dirlean did show up shortly after we started and was there when we finished

Barbee testified he did not want to be at trial, and was worried and scared. He testified that on the morning of the preliminary examination an unknown gunman appeared on his porch, and that he did not know whether the gunman was connected to defendant. Barbee also testified that despite the incident with the gunman, he testified at the preliminary examination.

Chris Johnson was subpoenaed but did not appear at trial. His preliminary examination testimony was admitted at trial, which included testimony that he was nervous about testifying. Initially, Johnson did not answer the prosecutor's questions regarding being offered money in regard to his testimony but, when threatened with contempt, Johnson testified that a woman who identified herself as defendant's mother offered him $1,000. Johnson testified that he did not accept the money.

The prosecution maintains that Barbee's and Johnson's testimony was not offered to prove knowledge of defendant's guilt, but rather, was relevant to these witnesses' credibility and to explain their resistance to testifying. The prosecution argues that this evidence was more probative than prejudicial given that neither incident was tied or attributed to defendant, and that *Long, supra*, is thus inapplicable.

We conclude that even if admission of this evidence was plain error because the prosecution presented no evidence linking the threats to defendant, reversal is not warranted because the error did not affect the outcome of the proceedings given the weakness of defendant's alibi defense and the strength of the proofs against defendant. *Carines, supra.*

IV

Defendant's final argument is that he was denied due process and the equal protection of the law by the trial court's failure to give credit against his new minimum sentences for the eight months (April 5, 2002 through December 3, 2002) he served in jail before his sentences for the instant crimes, which he committed while on parole.

Defendant acknowledges the authority holding that no credit may be granted for offenses committed while on parole, but argues that "notwithstanding the decisions to the contrary," the grant of credit he seeks is required as a matter of statutory interpretation under MCL 769.11b. Defendant asserts that this Court must remand to the trial court for amendment of the judgment of sentence to reflect that he receives credit against his new minimum sentences, or, at minimum, this Court should remand to the trial court for a determination of the status of defendant's prior sentence for purposes of determining whether he is entitled to credit against the sentence imposed in this case. Defendant argues that the eight months he spent in jail was for the instant offenses rather than any violation of parole, and that he thus fell within the jail credit statute in that the time he served was "for the offense of which he is convicted," MCL 769.11b. Defendant also argues that the grant of credit he seeks is constitutionally required as a matter of due process, equal protection and the double jeopardy right to not be subjected to more punishment than the Legislature intended, US Const Ams V, XIV; Mich Const 1963, art 1, §§ 2, 15 and 17.[7]

[7] Defendant also cites an unpublished decision of a panel of this Court as supporting that "a (continued…)

Whether defendant is entitled to credit for time served is a question of law this Court reviews de novo. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

A

A defendant who receives a consecutive sentence for an offense committed while on parole for a prior offense is not entitled to credit for time served against the subsequent offense. *People v Watts*, 186 Mich App 686, 687, 691; 464 NW2d 715 (1991); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). The credit for time served before sentencing on the subsequent offense must be applied to the remaining portion of the sentence for the paroled offense. *Watts, supra* at 687; *Brown supra* at 359. To the extent defendant asserts *Watts* and *Brown* were wrongly decided, we decline to revisit those holdings.[8]

Defendant's argument that the credit he seeks is constitutionally required fails as well. See *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 147 (1994) (fact that under MCL 791.238[9] parolees are precluded from receiving credit for time served while being held on parole detainer, and are thus treated differently than persons in jail awaiting trial, is not unconstitutionally discriminatory; statute does not violate rights of equal protection and due process, US Const, Am XIV, § 1 and Const 1963, art 1, §§ 2, 17, nor does it inflict cruel and unusual punishment, US Const Am VIII, or cruel or unusual punishment, Const 1963, art 1, § 16).[10]

(…continued)

defendant in this situation may be entitled to jail credit." Unpublished decisions are not precedentially binding, MCR 7.215(C), thus we do not address the case defendant cites.

[8] The consecutive sentencing statute, MCL 768.7(a)(2), provides in part:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

In *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996), the Court held that under the 'remaining portion' clause of MCL 768.7(a)(2), the offender must "serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve."

[9] MCL 791.238(2) provides in part:

> "A prisoner violating the provision of his or her parole . . . is liable, when arrested to serve out the unexpired portion of his or her maximum imprisonment."

[10] Nor do we agree that MCL 769.11b supports defendant's position. MCL 769.11b states:

(continued…)

Affirmed.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

(…continued)

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

This statute aims to ensure that a defendant receive credit for time served if held without bond. That is not the situation presented here. In the instant case, defendant was in custody on a parole hold while awaiting trial.